

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SHERI L. KENDALL, dba BALA HAIR
SALON, JAMES MASER, MAIZ
HOLDING COMPANY, dba PICANTE
COCINA RESTAURANT, on Behalf of
Themselves and All Others Similarly
Situating,
Plaintiffs,

v.

VISA U.S.A. INC., MASTERCARD
INTERNATIONAL, INC., BANK OF
AMERICA, N.A., a subsidiary of BANK
OF AMERICA CORPORATION, WELLS
FARGO BANK, N.A., a subsidiary of
WELLS FARGO & COMPANY, U.S.
BANK, N.A., a subsidiary of U.S.
BANCORP,
Defendants.

Case No.: C04-4276 JSW

**STIPULATED PROTECTIVE
ORDER**

1 1. PURPOSES AND LIMITATIONS

2 Disclosure and discovery activity in this action are likely to involve production of
3 confidential, proprietary, or private information for which special protection from public
4 disclosure and from use for any purpose other than prosecuting this litigation would be
5 warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the
6 following Stipulated Protective Order. The parties acknowledge that this Order does not
7 confer blanket protections on all disclosures or responses to discovery and that the
8 protection it affords extends only to the limited information or items that are entitled under
9 the applicable legal principles to treatment as confidential. The parties further
10 acknowledge, as set forth in Section 11, below, that this Stipulated Protective Order creates,
11 no entitlement to file confidential information under seal; Civil Local Rule 79-5 sets forth
12 the procedures that must be followed and reflects the standards that will be applied when a
13 party seeks permission from the court to file material under seal.

14 2. DEFINITIONS

15 2.1 Party: any party to this action, including all of its officers, directors,
16 employees, consultants, retained experts, and outside counsel (and their support staff).

17 2.2 Disclosure or Discovery Material: all items or information, regardless
18 of the medium or manner generated, stored, or maintained (including, among other things,
19 testimony, transcripts, or tangible things) that are produced or generated in disclosures or
20 responses to discovery in this matter.

21 2.3 "Confidential" Information or Items: information (regardless of how
22 generated, stored or maintained) or tangible things that qualify for protection under
23 standards developed under F.R.Civ.P. 26(c), including trade secret or other confidential,
24 strategic, research, development, or commercial information.

25 2.4 "Highly Confidential - Attorneys' Eyes Only" Information or Items:
26 extremely sensitive "Confidential Information or Items" whose disclosure to another Party
27 or nonparty would create a substantial risk of serious injury that could not be avoided by
28 less restrictive means.

1 2.5 Receiving Party: a Party that receives Disclosure or Discovery
2 Material in this action.

3 2.6 Producing Party: a Party or non-party that produces Disclosure or
4 Discovery Material in this action.

5 2.7. Designating Party: a Party or non-party that designates information or
6 items that it produces in disclosures or in responses to discovery as “Confidential” or
7 “Highly Confidential - Attorneys’ Eyes Only.”

8 2.8 Protected Material: any Disclosure or Discovery Material that is
9 designated as “Confidential” or as “Highly Confidential - Attorneys’ Eyes Only.”

10 2.9. Outside Counsel: attorneys who are not employees of a Party but who
11 are retained to represent or advise a Party in this action.

12 2.10 House Counsel: attorneys who are employees of a Party.

13 2.11 Counsel (without qualifier): Outside Counsel and House Counsel (as
14 well as their support staffs).

15 2.12 Expert: a person with specialized knowledge or experience in a matter
16 pertinent to the litigation who has been retained by a Party or its counsel to serve as an
17 expert witness or as a consultant in this action and who is not a current employee of a Party
18 or of a competitor of a Party’s and who, at the time of retention, is not anticipated to
19 become an employee of a Party or a competitor of a Party’s. This definition includes a
20 professional jury or trial consultant retained in connection with this litigation.

21 2.13 Professional Vendors: persons or entities that provide litigation
22 support services (e.g., photocopying; videotaping; translating; preparing exhibits or
23 demonstrations; organizing, storing, retrieving data in any form or medium; etc.) and their
24 employees and subcontractors.

25 3. SCOPE

26 The protections conferred by this Stipulation and Order cover not only Protected
27 Material (as defined above), but also any information copied or extracted therefrom, as well
28 as all copies, excerpts, summaries, or compilations thereof, plus testimony, conversations,

or presentations by parties or counsel to or in court or in other settings that might reveal Protected Material.

4. DURATION

Even after the termination of this litigation, the confidentiality obligations imposed by this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order otherwise directs.

5. DESIGNATING PROTECTED MATERIAL

5.1 Exercise of Restraint and Care in Designating Material for Protection.

Each Party or non-party that designates information or items for protection under this Order must take care to limit any such designation to specific material that qualifies under the appropriate standards. A Designating Party must take care to designate for protection only those parts of material, documents, items, or oral or written communications that qualify - so that other portions of the material, documents, items, or communications for which protection is not warranted are not swept unjustifiably within the ambit of this Order.

Mass, indiscriminate, or routinized designations are prohibited. Designations that are shown to be clearly unjustified, or that have been made for an improper purpose (e.g., to unnecessarily encumber or retard the case development process, or to impose unnecessary expenses and burdens on other parties), expose the Designating Party to sanctions if not remedied under Section 6.2.

If it comes to a Party's or a non-party's attention that information or items that it designated for protection do not qualify for protection at all, or do not qualify for the level of protection initially asserted, that Party or non-party must promptly notify all other parties that it is withdrawing the mistaken designation.

5.2 Manner and Timing of Designations. Except as otherwise provided in this Order (see, e.g., second paragraph of section 5.2(a), below), or as otherwise stipulated or ordered, material that qualifies for protection under this Order must be clearly so designated before the material is disclosed or produced.

Designation in conformity with this Order requires:

1 (a) for information in documentary form (apart from transcripts of
2 depositions or other pretrial or trial proceedings), that the Producing Party affix the legend
3 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” at
4 the top of each page that contains protected material. If only a portion or portions of the
5 material on a page qualifies for protection, the Producing Party also must clearly identify
6 the protected portion(s) (e.g., by making appropriate markings in the margins) and must
7 specify, for each portion, the level of protection being asserted (either “CONFIDENTIAL”
8 or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”).

9 A Party or non-party that makes original documents or materials
10 available for inspection need not designate them for protection until after the inspecting
11 Party has indicated which material it would like copied and produced. During the
12 inspection and before the designation, all of the material made available for inspection shall
13 be deemed “HIGHLY CONFIDENTIAL - ATTORNEYS’ EYES ONLY.” After the
14 inspecting Party has identified the documents it wants copied and produced, the Producing
15 Party must determine which documents, or portions thereof, qualify for protection under
16 this Order, then, before producing the specified documents, the Producing Party must affix
17 the appropriate legend (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL -
18 ATTORNEYS’ EYES ONLY”) at the top of each page that contains Protected Material. If
19 only a portion or portions of the material on a page qualifies for protection, the Producing
20 Party also must clearly identify the protected portion(s) (e.g., by making appropriate
21 markings in the margins) and must specify, for each portion, the level of protection being
22 asserted (either “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL - ATTORNEYS’
23 EYES ONLY”).

24 (b) for testimony given in deposition or in other pretrial or trial
25 proceedings, that a Party, or the non-party offering or sponsoring the testimony, may state
26 on the record, before the close of the deposition, hearing, or other proceeding, that portions
27 of the testimony are “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL - ATTORNEYS’
28 EYES ONLY.” All Parties and affected non-parties shall then have up to 60 days following

1 receipt of the deposition transcript to identify the specific portions of the testimony as to
 2 which protection is sought and to specify the level of protection being asserted
 3 (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL - ATTORNEYS’ EYES ONLY”).
 4 Until 60 days following receipt of the deposition transcript have elapsed, the entire
 5 deposition transcript shall be covered by the provisions of this Stipulated Protective Order
 6 as designated on the record. Only those portions of the testimony that are appropriately
 7 designated for protection within the 60 days shall thereafter be covered by the provisions of
 8 this Stipulated Protective Order.

9 The court reporter must affix to the top of each designated page the
 10 legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL - ATTORNEYS’ EYES
 11 ONLY,” as instructed by Designating Party.

12 (c) for information produced in some form other than documentary,
 13 and for any other tangible items, that the Producing Party affix in a prominent place on the
 14 exterior of the container or containers in which the information or item is stored the legend
 15 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” If
 16 only portions of the information or item warrant protection, the Producing Party, to the
 17 extent practicable, shall identify the protected portions, specifying whether they qualify as
 18 “Confidential” or as “Highly Confidential - Attorneys’ Eyes Only.”

19 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent
 20 failure to designate qualified information or items as “Confidential” or “Highly Confidential
 21 – Attorneys’ Eyes Only” does not, standing alone, waive the Designating Party’s right to
 22 secure protection under this Order for such material. If material is appropriately designated
 23 as “Confidential” or “Highly Confidential – Attorneys’ Eyes Only” after the material was
 24 initially produced, the Receiving Party, on timely notification of the designation, must make
 25 reasonable efforts to assure that the material is treated in accordance with the provisions of
 26 this Order.

27 5.4 Inadvertent Production of Privileged Documents. Inadvertent
 28 production of any document produced in response to discovery requests in this action by a

1 Party or non-party, that a Party or non-party later claims should have been withheld on
2 grounds of a privilege, including the work product doctrine (collectively referred to
3 hereinafter as an “Inadvertently Produced Privileged Document”) will not be deemed to
4 waive any privilege or work product protection. A Party or non-party may request the
5 return of any document that it inadvertently produced by identifying the Inadvertently
6 Produced Privileged Document and stating the basis for withholding such document from
7 production. If a Party or non-party requests the return, pursuant to this paragraph, of such
8 an Inadvertently Produced Privileged Document then in the custody of one or more parties,
9 the possessing parties shall within five business days destroy or return to the requesting
10 Party or non-party the Inadvertently Produced Privileged Document and all copies thereof
11 and shall expunge from any other document or material information solely derived from the
12 Inadvertently Produced Privileged Document. After a document is destroyed or returned
13 pursuant to this paragraph, a Party may move the Court for an order compelling production
14 of the document, but said Party may not assert as a ground for the entering of such an order
15 the fact or circumstances of the inadvertent production. Nothing in this Order shall
16 preclude a Party from arguing that the production of the allegedly inadvertently produced
17 document was not inadvertent or that conduct since production of the allegedly
18 inadvertently produced document constitutes a waiver.

19 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

20 6.1 Timing of Challenges. Unless a prompt challenge to a Designating
21 Party’s confidentiality designation is necessary to avoid foreseeable substantial unfairness,
22 unnecessary economic burdens, or a later significant disruption or delay of the litigation, a
23 Party does not waive its right to challenge a confidentiality designation by electing not to
24 mount a challenge promptly after the original designation is disclosed.

25 6.2 Meet and Confer. A Party that elects to initiate a challenge to a
26 Designating Party’s confidentiality designation must do so in good faith and must begin the
27 process by conferring directly (in voice to voice dialogue; other forms of communication
28 are not sufficient) with counsel for the Designating Party. In conferring, the challenging

Party must explain the basis for its belief that the confidentiality designation was not proper and must give the Designating Party an opportunity to review the designated material, to reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation. A challenging Party may proceed to the next stage of the challenge process only if it has engaged in this meet and confer process first.

6.3 Judicial Intervention. A Party that elects to press a challenge to a confidentiality designation after considering the justification offered by the Designating Party may file and serve a motion under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) that identifies the challenged material and sets forth in detail the basis for the challenge. Each such motion must be accompanied by a competent declaration that affirms that the movant has complied with the meet and confer requirements imposed in the preceding paragraph and that sets forth with specificity the justification for the confidentiality designation that was given by the Designating Party in the meet and confer dialogue.

The burden of persuasion in any such challenge proceeding shall be on the Designating Party. Until the court rules on the challenge, all parties shall continue to afford the material in question the level of protection to which it is entitled under the Producing Party's designation.

7. ACCESS TO AND USE OF PROTECTED MATERIAL

7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a non-party in connection with this case only for prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to the categories of persons and under the conditions described in this Order. When the litigation has been terminated, a Receiving Party must comply with the provisions of section 11, below (FINAL DISPOSITION).

Protected Material must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this Order.

1 7.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless
2 otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving
3 Party may disclose any information or item designated CONFIDENTIAL only to:

4 (a) the Receiving Party’s Outside Counsel of record in this action,
5 as well as employees of said Counsel to whom it is reasonably necessary to disclose the
6 information for this litigation;

7 (b) the officers, directors, and employees (including House
8 Counsel) of the Receiving Party to whom disclosure is reasonably necessary for this
9 litigation and who have signed the “Agreement to Be Bound by Protective Order”
10 (Exhibit A);

11 (c) experts (as defined in this Order) of the Receiving Party to
12 whom disclosure is reasonably necessary for this litigation and who have signed the
13 “Agreement to Be Bound by Protective Order” (Exhibit A);

14 (d) the Court and its personnel;

15 (e) court reporters, their staffs, and professional vendors to whom
16 disclosure is reasonably necessary for this litigation;

17 (f) during their depositions, witnesses in the action to whom
18 disclosure is reasonably necessary and who have signed the “Agreement to Be Bound by
19 Protective Order” (Exhibit A). Pages of transcribed deposition testimony or exhibits to
20 depositions that reveal Protected Material must be separately bound by the court reporter
21 and may not be disclosed to anyone except as permitted under this Stipulated Protective
22 Order.

23 (g) the author of the document or the original source of the
24 information.

25 (h) the Producing Party and any of its officers, directors,
26 employees, or attorneys.

27 7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
28 ONLY” Information or Items. Unless otherwise ordered by the court or permitted in

1 writing by the Designating Party, a Receiving Party may disclose any information or item
2 designated "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY" only to:

3 (a) the Receiving Party's Outside Counsel of record in this action,
4 as well as employees of said Counsel to whom it is reasonably necessary to disclose the
5 information for this litigation;

6 (b) Experts (as defined in this Order) (1) to whom disclosure is
7 reasonably necessary for this litigation, and (2) who have signed the "Agreement to Be
8 Bound by Protective Order" (Exhibit A);

9 (c) the Court and its personnel;

10 (d) court reporters, their staffs, and professional vendors to whom
11 disclosure is reasonably necessary for this litigation; and

12 (e) the author of the document or the original source of the
13 information.

14 (f) the Producing Party and any of its officers, directors,
15 employees, or attorneys.

16 8. USE OF PROTECTED MATERIAL IN COURT

17 8.1 In the event that any information designated "CONFIDENTIAL" or
18 "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY" is used in any pre-trial court
19 hearing or proceeding in this action, the Party using such Protected Material must give any
20 Producing Party no less than 72 hours notice of which Protected Material it plans to use.
21 The Parties (and any non-party Producing Party) will confer to determine the appropriate
22 procedures to be used to protect such Protected Material and, in the event that there is any
23 dispute as to whether such material continues to be "CONFIDENTIAL" or "HIGHLY
24 CONFIDENTIAL - ATTORNEYS' EYES ONLY," to resolve such dispute.

25 8.2 The Parties shall provide each Producing Party who is not a Party with
26 notice of potential use at trial of any Protected Material produced by that non-party if and
27 when that Protected Material is designated for use at trial (whether as a potential exhibit or
28 as deposition testimony or otherwise) in the required filings prior to commencement of trial.

The Parties shall give notice as soon as practicable after Protected Material which is not listed in those required filings is determined to be used by counsel for a Party in the course of examination or cross-examination at trial, but in any case no later than 24 hours prior to such use.

8.3 The Parties shall confer and attempt to agree before any trial on additional procedures under which "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY" information may be introduced into evidence or otherwise used at trial, including procedures applicable to Protected Material produced by a Producing Party who is a Party. Upon reaching agreement, the Parties shall give notice of the terms of such agreement to each non-party producing any Protected Material which may be used at such trial, and shall seek approval from the Court as necessary.

8.4 If necessary to address the use of Protected Material other than as set forth in this Agreement, the Court may be asked to issue an order governing the use of Protected Material at trial or court hearing upon reasonable notice to all Parties and non-parties who have produced such Protected Material.

9. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION.

If a Receiving Party is served with a subpoena or an order issued in other litigation that would compel disclosure of any information or items designated in this action as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY," the Receiving Party must so notify the Designating Party, in writing (by fax, if possible) immediately and in no event more than three court days after receiving the subpoena or order and before producing any Protected Material pursuant to the subpoena or order. Such notification must include a copy of the subpoena or court order.

The Receiving Party also must immediately inform in writing the party who caused the subpoena or order to issue in the other litigation that some or all the material covered by the subpoena or order is the subject of this Protective Order. In addition, the Receiving Party must deliver a copy of this Stipulated Protective Order promptly to the party in the

1 other action that caused the subpoena or order to issue.

2 The purpose of imposing these duties is to alert the interested parties to the existence
3 of this Protective Order and to afford the Designating Party in this case an opportunity to try
4 to protect its confidentiality interests in the court from which the subpoena or order issued.
5 The Designating Party shall bear the burdens and the expenses of seeking protection in that
6 court of its confidential material - and nothing in these provisions should be construed as
7 authorizing or encouraging a Receiving Party in this action to disobey a lawful directive
8 from another court.

9 10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

10 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
11 Protected Material to any person or in any circumstance not authorized under this Stipulated
12 Protective Order, the Receiving Party must immediately (a) notify in writing the
13 Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all
14 copies of the Protected Material, (c) inform the person or persons to whom unauthorized
15 disclosures were made of all the terms of this Order, and (d) request such person or persons
16 to execute the "Acknowledgment and Agreement to Be Bound" that is attached hereto as
17 Exhibit A.

18 11. FILING PROTECTED MATERIAL. Without written permission from the
19 Designating Party or a court order secured after appropriate notice to all interested persons,
20 a Party may not file in the public record in this action any Protected Material. A Party that
21 seeks to file under seal any Protected Material must comply with Civil Local Rule 79-5.

22 12. FINAL DISPOSITION. Unless otherwise ordered or agreed in writing by the
23 Producing Party, within sixty days after the final termination of this action, each Receiving
24 Party must return all Protected Material to the Producing Party. As used in this subdivision,
25 "all Protected Material" includes all copies, abstracts, compilations, summaries or any other
26 form of reproducing or capturing any of the Protected Material. With permission in writing
27 from the Designating Party, the Receiving Party may destroy some or all of the Protected
28 Material instead of returning it. Whether the Protected Material is returned or destroyed,

the Receiving Party must submit a written certification to the Producing Party (and, if not the same person or entity, to the Designating Party) by the sixty day deadline that identifies (by category, where appropriate) all the Protected Material that was returned or destroyed and that affirms that the Receiving Party has not retained any copies, abstracts, compilations, summaries or other forms of reproducing or capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers, transcripts, legal memoranda, correspondence or attorney work product, even if such materials contain Protected Material. Any such archival copies that contain or constitute Protected Material remain subject to this Protective Order as set forth in Section 4 (DURATION), above.

13. MISCELLANEOUS

13.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek its modification by the Court in the future.

13.2 Right to Assert Other Objections. By stipulating to the entry of this Protective Order no Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order.

13.3 Right to Use Own Disclosure or Discovery Material. Nothing in this Order shall limit or restrict a Party's rights, if any, to use its own Disclosure or Discovery Material or any information obtained independent of discovery in this action in any manner that the Party deems appropriate.

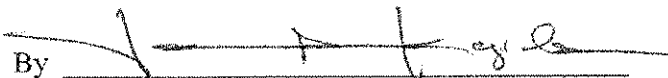
13.4 Service of Copies of Order. The Parties shall serve a copy of this Order simultaneously with any discovery request made to a non-party in this action.

IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

1 DATED: ^{MAY}~~April~~ 12, 2005

Respectfully submitted,

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3
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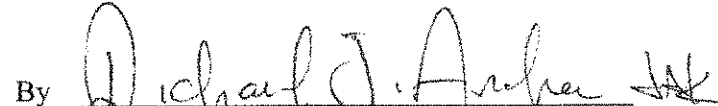
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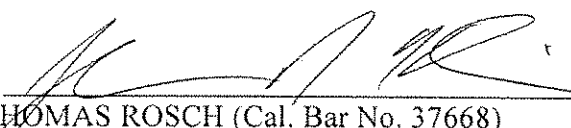
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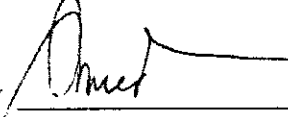
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18 Attorneys for Defendant U.S. BANK, N.A.

19 PURSUANT TO STIPULATION, IT IS SO ORDERED.

20 DATED: May 16, 2005

/s/ Jeffrey S. White

21 THE HONORABLE JEFFREY S.
22 WHITE
23 United States District Court Judge
24
25
26
27
28

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____
[print or type full address], declare under penalty of perjury that I have read in its entirety
and understand the Stipulated Protective Order that was issued by the United States District
Court for the Northern District of California on [date] in the case of *Kendall v. Visa U.S.A.
Inc., et al.*, C04-4276 JSW. I agree to comply with and to be bound by all the terms of this
Stipulated Protective Order and I understand and acknowledge that failure to so comply
could expose me to sanctions and punishment in the nature of contempt. I solemnly promise
that I will not disclose in any manner any information or item that is subject to this
Stipulated Protective Order to any person or entity except in strict compliance with the
provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the
Northern District of California for the purpose of enforcing the terms of this Stipulated
Protective Order, even if such enforcement proceedings occur after termination of this
action.

I hereby appoint _____ [print or type full name] of
_____ [print or type full address and
telephone number] as my California agent for service of process in connection with this
action or any proceedings related to enforcement of this Stipulated Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

[printed name]

Signature: _____

[signature]